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MEMO ENDORSED

November 1, 2013

BY E-MAIL
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Honorable Richard J. Sullivan
United States District Judge
United States District Court
Southern District of New York
500 Pearl St., Room 615
New York, NY 10007

Re: ***Enzo Biochem, Inc., et ano. v. PerkinElmer, Inc., et ano.***
03 Civ. 3817 (RJS)

Dear Judge Sullivan:

Pursuant to your Honor's Memorandum & Order (the "Order") filed October 29, 2013, this letter is submitted jointly on behalf of Enzo Biochem, Inc. and Enzo Diagnotiscs, Inc. (collectively "Enzo") and PerkinElmer, Inc. and PerkinElmer Life Sciences, Inc. (collectively "PerkinElmer") to address the pretrial schedule and the trial date of January 13, 2014.

On September 27, 2013, at the conclusion of the oral argument of PerkinElmer's summary judgment motion regarding Enzo's non-patent claims, after a brief discussion with counsel concerning a trial date, your Honor stated,

> "I will issue a ruling that gives greater guidance, and then probably at the end of that ruling I'll ask you to submit a joint letter with your proposals as to next steps, and then maybe you'll agree or disagree. We'll have some combination of those two things." (Tr. at 48)[1]

Since the receipt of the Order, counsel have been diligently working to devise a pretrial schedule covering all of the necessary and required steps to make this case ready for trial by the date Your Honor identified, January 13, 2014. Those steps include (i) damages discovery, all of which had been stayed, (ii) expert reports, discovery, and Daubert challenges, and (iii) the preparation of the pretrial order, jury instructions and motions *in limine*. The parties have conferred and have identified tasks to be completed as shown on the attached schedule. We have also discussed dates which we could insert

[1] A copy of the transcript of the oral argument on September 27, 2013 is enclosed with this letter.

if necessary to be ready for trial by January 13, 2014. The parties respectfully suggest, however, that it would be extremely difficult to accomplish these tasks prior to the scheduled trial date, particularly in light of the Thanksgiving, Christmas and New Year's holidays. Thus, Enzo requests a continuance of the trial date until March 1, 2014. PerkinElmer concurs in this request.

Independent of the reasons indicated above, PerkinElmer seeks a short continuance of the trial because of a conflict in the schedule of William McElwain, lead trial counsel for PerkinElmer. Mr. McElwain will be engaged in an arbitration proceeding in Zurich, Switzerland from January 9 to January 17, 2014 under the auspices of the World Intellectual Property Organization. The hearing for the arbitration was set in a procedural order dated January 22, 2013, prior to the status conference in which the Court suggested the possibility of a trial in January 2014 for one or more of the actions brought by Enzo. The arbitration involves three arbitrators and lawyers from five law firms and cannot realistically be rescheduled. Mr. McElwain is the sole lawyer at WilmerHale who has been involved in the defense of PerkinElmer since the action's inception, and PerkinElmer respectfully submits that it would be prejudiced in the presentation of its defense if he is not available to be present at trial. PerkinElmer therefore requests a continuance, at least to accommodate this conflict, which Enzo does not oppose.

Counsel are, of course, available at your Honor's convenience to discuss the trial setting and other pretrial matters.

Respectfully yours,

Jeffrey R. Mann

cc: William McElwain, Esq. (with enclosures) (via email)
Omar Khan, Esq. (with enclosures) (via email)

The parties' adjournment request is granted. Trial will commence on Tuesday, March 18, 2014 at 9:00 a.m. in Courtroom 905. The parties shall submit a proposed pre-trial schedule by November 8, 2013.

SO ORDERED
Dated: 11/4/13
RICHARD J. SULLIVAN
U.S.D.J.

In The Matter Of:

ENZO BIOCHEM, INC., et al., v

PERKINELMER, INC., et al.,

September 27, 2013

SOUTHERN DISTRICT REPORTERS

500 PEARL STREET

NEW YORK, NY 10007

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ENZO BIOCHEM, INC., et al.,

Plaintiffs,

v. 03 Civ. 3817 RJS

PERKINELMER, INC., et al.,

Defendants.

----------x

September 27, 2013
3:05 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

(In open court)

(Case called)

THE COURT: We are here in connection with Perkinelmer's motion for summary judgment on the non-patent claims. So I have read the briefs, got all the attachments. I think I understand it, although I understand there is some the moving party has missed. That is why you're here to keep me honest and sure. Since it is the defendant's motion, we'll have them go first. I may interrupt a little here and there, and after that who will argue?

MR. MANN: I will.

THE COURT: So then I will give you a chance to respond, and then since it is your motion, Mr. McElwain, I will have you back.

MR. McELWAIN: May I address you from the podium?

THE COURT: That is probably best over here. The acoustics here are a little bit of a chance, so try to speak slowly and distinctly just because things get -- the walls just -- they're beautiful, but sound just bounces off them in every direction.

MR. McELWAIN: I have a slide here, mostly just excerpts from the contract, but will help us. Just to orient ourselves, your Honor, the first page is a chronology. I wanted to point out some things.

First of all, the contract we are here on today is primarily a distributorship agreement. The settlement agreement was entered into at the same time in 1999 with a breach of contract action, as I understand.

The settlement agreement was entered and distributorship was entered into in 1999. Enzo first commenced suit in 2002, and unusually neither party at that time took any action to terminate the distributorship agreement even though it could be terminated within six-month notice even without cause.

The distributorship agreement continued during the early pendency of this suit until 2004. The event that occurred in 2004 was the expiration of the warrants which will require the patents that dealt with the labeling of the base of the nucleotide. When the lower patents expired, Perkinelmer let the distributorship agreement expire, and then finally factual discovery ended in 2005.

The second tier, your Honor, this case like the Emerstadt case you heard of in August, presents an unfortunate question of what claims are in the case and what claims are not in the case. I have attempted to identify all the claims discussed on the brief, and there are 14 of them. At two minutes a shot, I don't think I would get through all of them.

On the left I have listed the claims that at least from my standpoint seem to be pled in the complaint. On the right I tell you what has happened to the claims that have been

pled in the complaint and then list the additional claims.

THE COURT: I get that.

MR. McELWAIN: For our purposes, two claims have been clearly withdrawn, the Lanham Act claim and unfair competition claim.

THE COURT: Right.

MR. McELWAIN: Two other claims have been recast, and one claim I don't know if it is in or not, tortious interference. I will concentrate on the first three claims which I say appear to have some grounding on the complaint. If I have time, I will roll into the merits of the remaining claims, or if your Honor has any questions.

THE COURT: Okay.

MR. McELWAIN: When I say the primary claim in the case will be the one involving research use or restrictions, that clearly is pled in the complaint, but I would say even that claim has morphed substantially over the time period that this case has been pending.

If I had to summarize the complaint, it was that Perkinelmer, Orchid, MPI and Amersham together had engaged in sales for non-research purposes. That is the thrust of the complaint.

What those non-research purposes were, who the sales were made to, were not identified in the complaint, so we answer contention for factual discovery. You say we breached

the distributorship agreement, identified the provisions and tell us what we did to breach them. Insofar as the research restrictions are concerned, we got two answers back.

One was that Perkinelmer sold or is selling to Orchid large quantities modified nucleotides covered by Enzo's patents not listed in the distributorship agreement. The distributorship agreement, as your Honor may note from the papers, has as an exhibit, Exhibit C, and this is long list of nucleotides. I understood the interrogatory answer to be directed to a different type of claim which was the acyclo terminated products, which your Honor will recall from the patent decision, were not listed in Exhibit C.

As a result of your patent decision, they have been found not to infringe, but back when Enzo served this interrogatory they were saying the sale of those products breached the distributorship agreement and they made also made allegations against MPI. Those are the claims I attempted to address in our papers, pointing out that there was no evidence of any non-research sales or uses by Orchid and MPI and, in any event, Perkinelmer wasn't a guarantor of the actions of its distributors.

In response, Enzo came up with two arguments that at least with respect to Perkinelmer are wholly new. They weren't briefed in front of Judge Sprizzo. They weren't part of the complaint. They weren't part of Enzo's answers to

interrogatories.

The first argument is that the distributorship agreement prohibits sales to commercial profit entities. In other words, the distributorship agreement is not simply one that limits the uses to which customers can put products, but limited identity of people to whom Perkinelmer could sell. According to them, we could not sell to commercial profit entities, with one minor exception which I will get to later.

The second point was not that they had any evidence of our own non-research use of products or even of non-research use of products by customers, but that we were vicariously liable for any breaches of the distributors. That would be MPI, Amersham and Orchid. These are the two arguments made in the response not addressed in my opening brief because they had never been raised. I will try to address them in the reply brief and try to address it today.

First, we can blow through the next slides but orient ourselves a little bit on key provisions. On Slide 5 is the research restriction which prohibits the sale of products to -- which allows the sales of products to the research market for research use only by the research end user and prohibits the sale of products for therapeutic or diagnostic purposes and also states not to be commercially developed or exploited.

MR. MANN: Forgive me. He skipped over Slide 4.

THE COURT: He can skip over where he wants.

MR. MANN: Where would you like me to lodge my objection to this exhibit?

THE COURT: You're objecting to the exhibit?

MR. MANN: To Slide 4 which looks in the nature of a supplemental reply brief. He is citing case authority and now doing what I complained about Amersham doing. This is supposedly a demonstrative exhibit. He introduced it by saying it was largely excerpts from the complaint.

MR. McELWAIN: It is quotes from Enzo's brief, your Honor.

MR. MANN: To the extent that this document provides something other than what is traditionally expected in the demonstrative, which I must tell you I haven't seen until just now, I think it is objectionable.

THE COURT: All right. You're objecting to the characterization of the current arguments?

MR. MANN: Sorry?

THE COURT: Page 4?

MR. MANN: On Page 4, there is an example. He is using this as an opportunity to rehash the law on the subject.

THE COURT: You referred --

MR. McELWAIN: These are quotes I literally clipped out of Enzo's brief.

MR. MANN: That is what a reply brief is for, your Honor.

THE COURT: I think the first chronology, your opposing that as well?

MR. MANN: No, of course not. I don't want to interrupt Mr. McElwain as he argues. You understand the nature of my complaint about this?

THE COURT: Yes. Go ahead.

MR. McELWAIN: To Slide 5 is the basic research use restriction provision that the parties have been arguing about.

Slide 6 is what I think as the core duty on Perkinelmer, which is the duty to label its products for distribution and sale, advising customers of the research use restrictions.

Slide 7 is a duty to inform Enzo if Perkinelmer has any reason to believe there is a violation of the research use restrictions.

Slide 8 deserves to be paused on. It imposes a special duty on Perkinelmer with respect to commercial customers, stating after the effective date of this agreement, to inform in writing of any affiliates who are commercial entities and in order any of the products of the notice given in sub-restrictions G and H, the research use restrictions.

THE COURT: Right.

MR. McELWAIN: Then there is a requirement that Enzo exercise its best efforts to comply with the agreement and prevent commercial development by others.

Lastly, on Slide 10, your Honor, there is a very long provision included here simply because it permits Enzo, if they have reason to believe that distributors have engaged in any infringing activities, gives Enzo the ability to ask the distributors be removed from the authorized distribution list.

Moving to Slide 11 and characterizing Enzo's argument, their commercial entity argument, as I understand it now, appeared first in Dr. Rabbani's declaration filed in this latest round of briefing. Dr. Rabbani is the CEO of Enzo.

In the briefing before Enzo, before Judge Sprizzo, he filed a very lengthy affidavit. In the brief before your Honor, he filed a supplemental declaration, and for the first time Enzo advanced the theory that Perkinelmer could only sell to commercial entities that were doing research services on behalf of the end user in the research market. That is that Perkinelmer could not sell to drug companies, could not sell to other research companies, that the ability to sell to commercial interests was extremely limited.

THE COURT: There is a research-only restriction that is alleged in Paragraph 58 C, right?

MR. McELWAIN: Correct.

THE COURT: So they're saying there is a breach of that provision by sales to folks who are not engaged in research only. That is my understanding of what they're saying. Is that different than your understanding?

MR. McELWAIN: It is, your Honor, in the sense of the research burden only is a paraphrase of the provision. If we go back to Slide 5, it is all products sold or distributed by Enzo for sale and distribution for the research market, for research-use only by the research end user. Their argument, as I understand it, is we could not sell to any commercial entity that engaged in product development, a drug company being the type of example.

Drug companies, obviously, engage in massive amounts of research. These products are essentially research tools. As I understand their argument, the idea we could not sell to commercial entities at all is completely rebutted by Section 1 (i), shown on Page 8, in which specifically requires us to give notice to commercial entities of the research restrictions.

I think the reason why you know that their argument that our entitled commercial customers we can sell to is limited if we can only sell to customers who did nothing but research, there would have been no requirement on the labeling at all. The reason we had to label was because we were going to be selling to drug companies. Drug companies had to know that when they got these products, they could use them for research, but they could not use them, for example, to make a diagnostic product or therapeutic product.

THE COURT: Isn't that for the jury to decide?

They're saying that the fact that you sold to these

folks who are not physically engaged in research supports the allegation that you breached the agreement. The agreement has a research-only restriction. There were sales to lots of entities that were not primarily researchers, and if the defense will be well, they were, but they were using the product only for research and not for other commercial purposes, that is a defense at trial.

It is not clear to me why they had a cause of action or why there is sufficient evidence in the record that would allow them --

MR. McELWAIN: The only evidence they have in the record is we sold, for example, to Pfizer.

THE COURT: Say that again.

MR. McELWAIN: The only evidence they have in the record is we sold, for example, to a drug company like Pfizer. Pfizer obviously sells drugs. Pfizer obviously engages in research and development. They're the plaintiff here.

If they want to prove that there was a violation of the research restrictions, at a minimum they have to come in with someone from Pfizer saying yes, we used this as a diagnostic product. We labeled the product appropriately with labels saying you can only use this for research purposes. That is the core obligation imposed on us.

There is no reason in the world to think that the Pfizers of the world violated that restriction. One reason

there is no reason to think that the Pfizers of the world violated that restriction is because these products are research tools. That is what people use them for.

I would say on summary judgment, your Honor, absolutely they have to come in with some evidence that somebody used this product for a non-research purpose. They haven't done that and they can't do it because these are research tools.

THE COURT: This is the deposition of, Page 149, Exhibit 8 to Mr. Elliott's declaration. The question is:

"Q Were you aware that any of the products were being used for drug discovery?

"A Yes.

"Q Were you aware that any were being used for drug development?

"A Yes."

And the next question:

"Q Which of your customers used this products for their own developments?"

And then I think there is disagreement what is research and not research.

MR. McELWAIN: Your Honor, that is the core contractual interpretation issue, not a dispute of fact, but an issue of how you interpret this contract. Can you interpret this contract as being limited to the research that academics

do, which I believe is perhaps Enzo's interpretation?

THE COURT: What are commercial purposes as you then define that term?

MR. McELWAIN: The opposite of research. This is belts and suspenders research.

THE COURT: The opposite of research?

MR. McELWAIN: Like lawyers draft contracts all the time. It is a belts and suspenders definition of here's the things you can do. You can sell it for research purposes and you can't use it for any commercial purposes, which I think would certainly include, in the case of non-distributors, you can't resell the product I think is the primary point of the commercial aspects of this.

The notion that a person sitting in a lab at Yale University is engaged in research with that very same person sitting in a lab at Pfizer is not engaged in research makes no sense in light of the contract and the express indication in the contract that Perkinelmer could sell to commercial entities. Again, your Honor, if there was no ability at all to sell to commercial entities, there would have been no reason to require us to label the products.

THE COURT: I understand the argument, but I am not sure it is as simple as you suggest. There are lots of products that are labeled to be used for only specific use even though they're providing supplies to a party that should be

only engaged in the specific use.

MR. McELWAIN: The way I would roll this back is to think about it in terms of Perkinelmer and what is practical. We have these products to distribute. We sold them literally to thousands of customers, many of them academic institutions and many of them commercial entities. We have the ability to label the products, which we do. We have the ability to write letters to the entities which the contract required us to do and which we did.

We have no meaningful ability to know every use the customer would make of the product. The question for the breach of contract is what were our duties? Our duties were to label products for research uses only.

THE COURT: You're saying that the duty is limited simply to labeling?

MR. McELWAIN: I would say that is correct.

If we had a knowledge that someone was going to misuse it, then that might be problematic, but it can't be that we make an authorized sale and then the customer gets the product and unknown to us misuses the product, and our sale all of a sudden becomes a breach of contract. It is just not practical from the standpoint of NEA and Perkinelmer. When they make the sale, they have to have some knowledge whether this is an appropriate sale.

THE COURT: It seems to me the distribution agreement,

the 1 (f) expressly references that you cannot make a sale to anybody for commercial use or exploitation without express written authorization of Enzo. Why do you need that if this is just labeling?

MR. McELWAIN: The "for commercial use" is the antonym of "not for research." I guess I don't understand how a contract like this could work if our customers came in, we said listen, customer, you have to use this for research, they say fine, we are going to use it for research, and later they don't use it for research, but that all of a sudden put us into a breach of contract situation or patent infringement situation.

It is not a realistic way to interpret the contract, in my view, particularly in light of the contract expressly giving us the right to sell to commercial entities.

THE COURT: "Research market" and "research end-user" are defined, right?

MR. McELWAIN: Not very helpfully. "Research market" is defined as "research field," and then research end-user, I think, is --

THE COURT: If it is not helpfully defined, then you can argue the --

THE COURT: If it is ambiguous, then we are free to go to extrinsic evidence what the parties intended.

MR. McELWAIN: I think the core issue, the contractual issue, your Honor, to me, is could you sell to commercial

entities or not. Is research or product development somehow not permitted research under this agreement.

If you find that is true, then you have some issues. If you find that is not true, that research or product development is research done at a university or commercial entity, summary judgment is --

THE COURT: All right. But Perkinelmer expressly agreed all products sold or distributed would be used only by the research end-user and were neither intended for nor to be used for diagnostic, therapeutic purposes nor to be commercially developed or otherwise commercially exploited.

It is pretty broad language. So it seems to me fair to use that language to conclude that I can only sell to people doing pure research.

MR. McELWAIN: I don't see how you can square that language with the later language that allows the sale to commercial entities.

THE COURT: Look, there are commercial entities that engage in research, and you have doctors and scientists. It seems to me that that would be permitted. If there is somebody who is at Pfizer writing a paper, that they don't use the product for that, they can't send it over to the other part of the lab at Pfizer where they mass produce or are hoping to develop commercially exploitable products. Isn't that a rational distinction that would be consistent with the language

of the agreement?

MR. McELWAIN: Once you are into the world, you say we can sell to Pfizer, it seems to me it is their burden to come in and show someone at Pfizer used the product improperly. They haven't tried to do that. They're resting their case on the mere fact we sold to Pfizer.

THE COURT: That is the reach of your focus.

MR. McELWAIN: I have exhausted myself on commerce entities. The other theory appears in the response is the notion that we are per se liable for the acts of our distributors because our distributors are agents. This allegation comes without any citation to any law that suggest that distributors are people's agents or facts that suggest these distributors are our agents.

I think there is no basis for an agency theory at all. We sold to distributors. We advised them of the nature of the contract. They did their own labeling. We had no knowledge that our distributors were or were not doing anything improper.

I have no knowledge of that today, but if there was some proof that MPI or Amersham or Orchid had violated this agreement, that fact alone cannot impose liability on Perkinelmer.

THE COURT: All right.

MR. McELWAIN: Leaving the research restrictions, I do want to point out the very unusual nature of this case, which

is the Exhibit C products have almost in their entirety been found to be non-infringing. The only products remaining that are still under the cover by the word "patents" or "bio-labeled products" are a few random other products.

All of the products we sold to Amersham, all the products we sold to MPI, and all or most of the products we sold to Orchid have been found not infringing, and that would give you the case law in our briefs under those circumstances research restrictions are unenforceable as a matter of New York law and federal law.

THE COURT: Restriction of trade theory?

MR. McELWAIN: Correct.

THE COURT: It doesn't fix prices? It doesn't divide up territories? It is not traditional restraint of trade?

You're saying it is not make or break products?

MR. McELWAIN: I don't think it is a stretch at all. Enzo is out there selling basically identical products. We are direct competitors with Enzo in the commercial market. To say there is this notion we can't sell in the commercial market?

They don't have a right and ability, absent intellectual property, to enter into a contract with us saying we can't compete with them in the commercial market. That is the effect of where we are today with this contract. I think federal law and state law define that unenforceable per se with respect to non-infringing products.

I probably should have begun with a fundamental fact, which with I am sure you got from the papers, but I want to emphasize this. These are products we developed, we made, we sold. This is called a distributorship agreement. Enzo doesn't touch these products at any point in the distribution. As a result of your Honor's patent ruling, they do not infringe the Enzo patent.

THE COURT: All right.

MR. McELWAIN: The payment defense which is sort of still hanging out there I think is largely the same issue we talked about with respect to the breach of contract and research restrictions. I think as a matter of patent infringement, it puts the point on how it can be that a party that makes the proper sale, no infringement, all of a sudden their customer misuses the product, and infringement blows back to the party that sold it.

Here we were authorized to make the sale. We made the sale to Pfizer. It cannot be that that sale, not patent infringement the date of the sale, somehow becomes patent infringement a year later when Pfizer misuses the product. The payment defense is highly correlated with breach of contract, but puts the point on you've got to measure Perkinelmer's culpability and liability when they make the sale.

THE COURT: There are a couple other contract claims related to discounts.

MR. McELWAIN: Correct. On Slide 16, I have crammed all the provisions related to the discount issue on one slide. This is a pure issue of contract interpretation, I think. To us the agreement is clear, this is just a bulk sales kind of provision. The more you buy, the less it costs.

THE COURT: Why do you need a range if that is the case? It seems to me you just need thresholds, it wouldn't be ranges.

MR. McELWAIN: Thresholds would be, under their theory, you only get the discount if you're above the threshold. For our theory is you make between two and a half and $3 million in sales, there's a 45 percent discount. You make above 5 million, you get a 52 percent discount. It is simply you go to Exhibit H, you look at what range you're in. If you're in that range, that is the discount you get.

THE COURT: The issue is whether it is graduated or whether --

MR. McELWAIN: The phraseology people use is stepped up applies to all the sales.

THE COURT: Right.

MR. McELWAIN: You can easily imagine parties entered into a stepped discount provision. I don't see it in this agreement. It would have been an easy-enough thing to write. This agreement says 35 percent, that is the number. If you sell it in different ranges, you get a different number. It is

simple and straightforward to me.

I would also add that there is only one piece of parole evidence on this issue. I don't think it is relevant. The contract is ambiguous. That piece of parole evidence in Exhibit 17 to the Kahn declaration purports to make conversation between Dr. Rabbani and Mr. Levitt of Perkinelmer, where our interpretation of the agreement is confirmed prior to signing it. I don't think we need to go to parole evidence. If you do go to parole evidence, there is one case out there for interpreting the agreement.

THE COURT: All right.

MR. McELWAIN: I have obviously used my 30 minutes. I have 9 more claims to go. How would you like me to proceed, your Honor?

THE COURT: Why don't you to take another six minutes.

MR. McELWAIN: The rest of our claims are not in the complaint in any appropriate way. I can pursue that point or I can deal with them on the merits.

THE COURT: I guess I need to talk about the kits, the full kit versus the sort of manipulated kits.

MR. McELWAIN: This is a hard claim for me to understand because it never has been pled that well. In the complaint they said you split the kits and nucleotides. We asked in our interrogatory, identify the breaches and evidence. We got nothing back on kits.

Then Judge Sprizzo is saying there is no evidence in front of Judge Sprizzo. Now we get what to me is an entirely new theory, which is breach of the obligation of good faith and fair dealing, which is not pled in the complaint in any way, shape or form.

Lets assume it is in the case. They cite four e-mail trails. That is our sole sum of evidence. There is no deposition testimony discussing e-mail trails. I worked on this case since 2002. I have a hard time interpreting what these e-mail trails are all about. This is what I think they're about. On Slide 17 I have excerpted out from Exhibit C a bunch of kits that show up in Exhibit C. That is one set of kits that shows up in Exhibit C.

Then if you look at Slide 18, I'll see this phrase nucleotides set in micro-max re D and A, a system which is a type of kit introduced around the time the agreement was entered into. This portion of Exhibit C specifically is talking about separating out the nucleotide set and dealing with that separately for the micro-max re system.

That is my understanding of what those four e-mail trails were about. I don't think either you or I have to interpret 20-year-old, 15-year-old e-mail chains unaccompanied by any deposition testimony. They simply have no proof of this alleged breach, in my view. I think it is wholly new, the introduction of the notion of good faith and fair dealing,

which was never at issue in the discovery in this case.

THE COURT: Let me hear what Mr. Mann has to say and you will get a chance to respond, to touch on things you didn't. Go ahead, Mr. Mann.

MR. MANN: We, too, have a demonstrative, but this one really is just a series of excerpts.

THE COURT: Excerpts from the record?

MR. MANN: Excerpts from the complaint, excerpts from the agreements.

I think, your Honor, I should begin with the core question Mr. McElwain spent so much time discussing, and that is this issue of whether or not there is a blanket provision to sell to commercial entities merely by reason of the provision of the contract that carves out --

THE COURT: The question should probably be is there a blanket prohibition to anyone other than a research institution?

MR. MANN: I think there is with an exemption. I think the contract your Honor pointed out is rather clear that the intention here was to limit sales to research end-users in the research market.

THE COURT: Right.

MR. MANN: Those words have serious meaning.

THE COURT: "Research market" means what?

MR. MANN: "Research market" means sales to academia.

THE COURT: What are you referring to, what part of the agreement?

MR. MANN: I'm referring to the contract itself, the language that defines research end-user and research market. These are clearly defined to mean the research field, not the commercial development field.

THE COURT: "Research market" means the research field?

MR. MANN: Right.

THE COURT: Don't you find that self-defining?

MR. MANN: But it is understood in the business, your Honor.

THE COURT: It is not in the agreement, though, right?

MR. MANN: Well, it is in the agreement and understood by the parties.

THE COURT: There is no definition of research field in the agreement.

MR. MANN: To the extent that is a question, that is an issue of fact that can surely be tried.

THE COURT: The question is, is there evidence in the record, extrinsic evidence as to what "research field" means? And is it disputed or undisputed as to what it means?

MR. MANN: I believe it is not disputed what it means.

THE COURT: So is --

MR. MANN: I believe it is a construct by PE that

suddenly this has become plain in its meaning. Everybody in this business knows what the research market consists of and who research end-users are, and there is a specific prohibition in the contract against commercial developments and therapeutic use and diagnostic use, and those are the uses that the products are put by commercial entities.

Now, there is a carve-out for a contemplation of sales to commercial entities, but as your Honor pointed out, there are ways in which commercial entities can conduct business which have nothing to do with product development.

THE COURT: Unfortunately, the agreement doesn't say, "commercial entities." It says "commercial use," and so I don't think the agreement, by the terms, explicit terms, says that you can't sell to commercial entities. It says you can't use or exploit these products commercially.

MR. MANN: It also contemplates, specifically contemplates in Paragraph I or 1, that there may be a circumstance in which a commercial entity is sold these products.

THE COURT: Right.

MR. MANN: It provides certain prohibitions with respect to them, and it is based on that that Perkinelmer bootstraps itself into the argument it is free to sell to commercial entities and all they have to do is give the notice.

The core question here has two pieces. One is what is

the breadth and scope of the restriction? And what is PE's responsibility with respect to it? They say all they have to do is give a notice, perhaps write a letter. If that were true, Paragraph 13 has no meaning whatsoever, in which they undertook best efforts to prevent improper sales under Section 1. That in and of itself --

THE COURT: I says agrees to inform in writing each of the customers who are commercial entities and who order any of the products in the notice given in Subsections G above, and request such customers to acknowledge their written acceptance of the notice prior to shipping the products and to make a copy of the notice.

MR. MANN: That would cover, your Honor. For example, MPI or Amersham. PE got acknowledgments from Orchid and MPI, but never got one from Amersham. That by itself, that is a breach of this provision.

PE had more than a duty simply to write a notice to Amersham to say, "By the way, fellows, you're a self-distributor now and you are limited in what you can do. Here is the limitation."

They had to follow up. They had to at least do what Enzo did, which is to ask the question of Victoria Singer were you making commercial sales or commercial development? On the basis of the mere question, she said yes, surely under the best efforts provision of Paragraph 13, PE had an obligation to ask

the question. Had they asked the question, they would have gotten the answer. Had they gotten the answer, they were obliged to tell Enzo. They did neither.

So as to the core issue as characterized by Perkinelmer, there was a restriction known in the trade to limit these sales to commercial -- excuse me -- academic or other research market entities who would only use this product for research, and if and to the extent there was a sale to some commercial entity who could do it that way, use it only for pure research, then it was a burden of PE to make certain that they did it to gain, to send notices, get from them acknowledgments and at least follow up as required by the best efforts provision.

That plays directly into this issue of pricing and payment. There is a clear relationship between the price that was charged in this agreement by Enzo for research-use only and the eschewing of permission to allow commercial sales. Prices were very different for commercial sales. If we ever get to trial in this case, the evidence will show that.

THE COURT: The pricing, whose pricing?

MR. MANN: The price that PE would have sold for commercial purposes, for product development, if permitted, would have been considerably higher than the price for the limited purpose of research-use only.

THE COURT: When you said "would have been," what do

you mean, according to the agreement?

MR. MANN: If Enzo would have permitted commercial sales, the price at which PE would have sold the goods would have been much higher than the prices contained in the agreement that were limited and discounted because it was research-use only.

There is a whole different world of pricing that would apply. The advantages in this case for Enzo are not that PE didn't pay them for the sales they made for research-use only, it is that they didn't pay them for commercial sales which would have carried a much higher price.

The testimony will be just that, that the pricing world is very different when you're dealing with research-use only and sales to the University of Pennsylvania as sales are defined.

THE COURT: Here is my question.

Pfizer has scientists who write articles, right, and so they need materials with which to conduct research that will be the subject of their articles just like the University of Pennsylvania does. So are you saying the contract did not contemplate that PE could sell to Pfizer for that limited purpose?

MR. MANN: I'll answer you in two ways:

First, there are ways, clear ways that a commercial entity can use these products for research-use only. For

example --

THE COURT: My question is, under this agreement, was PE allowed to distribute to Pfizer or someone like Pfizer, a commercial entity, for that purpose?

MR. MANN: If Pfizer was using this material solely to advance its scientific knowledge, for the purposes of writing an academic paper, I would have to agree with you from an intellectual purpose. If they were using it for development of a product, that is another story altogether.

THE COURT: What does the record show with respect to one or the other?

MR. MANN: You read out a piece of that record when you referenced Victoria Singer's deposition. She says that that is what commercial entities do. They develop products, that is all they do and there are other --

THE COURT: Pfizer is a commercial entity, and that is not all they do, right? You said they sometimes do --

MR. MANN: They sometimes do, but at least one witness from one party in this case has said that commercial entities do research for commercial purposes. If and to the extent a sale is made to a commercial entity, it was incumbent upon PE in this case to determine what they were going to use it for.

If they were going to use it for a purpose prohibited by the agreement, it was the obligation of PE to tell that to Enzo. They didn't do that. They said all we have to do is

send the notice. If it was their sole obligation to send the notice, why did anybody write Paragraph 13 of the agreement, which creates a separate duty on the part of PE to use its best efforts to prevent that kind of activity.

THE COURT: Part of the transcript I read, which is 149 and 150, says were you aware that any were being used for the development of any end product?

And you're saying your drug development, you're saying that is not an interpretation for commercial exploitation, correct?

MR. MANN: I missed it.

THE COURT: The question is were you aware any of the products were being used for commercial use for drug development?

The answer of the witness, Ms. Singer was yes.

You understood that to be a permitted use? That is research, absolutely.

So I think what you are saying is that drug development is by definition commercial exploitation. It is not the kind of research I was talking about with Pfizer.

MR. MANN: That is quite correct. Ms. Singer is wrong when she understands research to include research --

THE COURT: I don't care what her interpretation is.

MR. MANN: What I am --

THE COURT: I am asking what is meant by the use of

the word "drug development" in the question, 150 line 7 through 8, and as to you, this drug development in your mind is synonomous with commercial exploitation.

MR. MANN: Yes, and in our view the time period that lapses between the undertaking of that research for commercial development and the development of the product which can be years is not relevant to the question. The mere fact that they embarked on commercial development research in, let us say 2013, but consistent get a commercially developed product approved by the FDA until 20/20 is not meaningful in the understanding of this agreement.

Here, as in other instances of this motion, your Honor, clearly there are two interpretations of this contract. There is PE's interpretation which limits their responsibility simply to writing letters and getting acknowledgements, and there is Enzo's interpretation of this agreement which is quite different as I have been discussing.

That by itself earns us I think the right to a trial on this issue.

THE COURT: There are a couple of other points Mr. McElwain made. There may be other points you want to answer first.

MR. MANN: Sure. Absolutely. He argues that PE was not a guarantor for the principal of an agent in MPI or Orchid or Amersham. If you look at the letters which PE wrote to

these entities informing them they were now self-distributors under an agreement between Enzo and PE and asked for acknowledgments of that so they would understand they are bound, and PE has an undertaking to make certain that they follow those prescriptions, then PE is liable if the entities that they are supposed to be supervising and watching don't perform in the way they're supposed to perform.

THE COURT: You say this is strict liability?

MR. MANN: Not strict liability. Had they undertaken to do their job and were nonetheless deceived, that would be an excuse, but they didn't undertake to do their job. All they did was write a letter.

THE COURT: What was their job beyond that?

MR. MANN: Their job was to write the letter, get an acknowledgement and supervise to the extent that Paragraph 13 requires them to inquire. They undertook in Paragraph 13 to exert its best efforts to comply with the provisions of Section 1 and to prevent, prevent commercial development and exploitation of the products. That is much more than just writing a letter and getting acknowledgement.

If they were so, what was the purpose of putting in Paragraph 13? It has to have some meaning, and that some meaning exceeds what Mr. McElwain says gives the sole responsibility to PE in these circumstances. Certainly there is a difference of opinion. It is a fundamental difference of

opinion, I grant you, but it is a difference of opinion that I think warrants a trial on that issue.

THE COURT: "Agrees to exert its best effort to prevent commercial development or exploitation of the products sold or shipped to others." Your view means that what, they have to go undercover?

MR. MANN: No, I don't want to be silly about it.

THE COURT: I mean what are they supposed to do? You write a letter saying you can only use it for the following purposes. They get acknowledgements and then what are they supposed to do?

MR. MANN: They knew MPI was using it and selling it for commercial purposes.

THE COURT: What is in the evidence in the record for that? Just a piece of --

MR. MANN: No. The evidence in the record is the correspondence and the testimony and the recognition that when Orchid and MPI were using these encyclics and attaching the nucleotides to them, that they were going to use it for commercial purposes. It is all Orchid does. That is all MPI does.

THE COURT: In the end, it is not. We already talked about the hypothetical which Pfizer sometimes does research. I don't know that these other operations sometimes do research?

MR. MANN: They do not. MPI uses it for commercial

purposes. They sold products.

THE COURT: Is the record clear that the defendants understood that and knew they were using it for commercial development?

MR. MANN: There is a -- I am sorry, I don't have the reference to it, to the Elliott declaration -- there is an interplay between Enzo and Orchid, and in it the Orchid person says, "Can I use this for commercial development?" "No" is the answer. "Can I use this for product development?" "yes."

THE COURT: All right. And so what you're saying is if the issue that the fact-finder gets to decide is whether the contract allows product development, the way product development is by definition, commercial development?

MR. MANN: It is, by the way, your Honor, Exhibit 9.

MR. LEFTON: 72.

MR. MANN: The summary of Ms. Singer.

THE COURT: Exhibit 9?

MR. LEFTON: 74.

THE COURT: 74.

MR. MANN: I am sorry. The exhibit tag was 9. It is Exhibit 74.

THE COURT: What is the exhibit to the --

MR. MANN: No. 74 to the Elliott deposition. May I hand it up, your Honor?

THE COURT: You may hand it up.

(Pause)

THE COURT: You're talking about Question 3? Even though I had commercial interest such as Pharma, can I use this product for internal research and development such as drug discovery? Answer, yes.

That is what you're referring to?

MR. MANN: Yes, drug discovery means drug --

THE COURT: I don't know that. How would I know that? Is there something in the record that defines that it is such?

MR. MANN: No.

THE COURT: Is there something in the record that indicates that is the term of art?

MR. MANN: I believe that is just a common sense interpretation of identification. If you identify a drug, that is the first step in development.

THE COURT: I don't know who wrote this and I don't know who chose these words, summary of the talk with Singer. That is somebody paraphrasing the conversation they had with her?

MR. MANN: Yes.

THE COURT: Somebody chose to use the word, "drug discovery." I don't know what the state of the record is who chose that word and why.

MR. MANN: The reason I showed it to you was in

response to a question whether or not PE had any knowledge or could have had any knowledge about the use that these products were being put. All they had to do was ask a question.

THE COURT: What does, "discovery" mean?

MR. MANN: What were you using it for?

THE COURT: Using it for drug discovery?

MR. MANN: What does that mean?

All of this comes back, your Honor -- and I don't think we should belabor this any further -- it all comes down to what is the obligation of PE in the context of the best efforts clause of this agreement?

Is it as they say, a requirement only to inform their customers of the research restrictions and get an acknowledgement thereof or is something different?

The provision of the contract provides for the giving of that notice and giving the acknowledgement and adds the best efforts undertaking to have some meaning.

THE COURT: While we are changing gears, can I ask you a question?

MR. MANN: Of course.

THE COURT: There are a couple of claims you walked away from. One is the Lanham Act and the other is unfair competition, right?

MR. MANN: Yes.

THE COURT: What of tortious interference? Are you

still sticking with that?
MR. MANN: Yes, and fraudulent inducement.
THE COURT: Let's talk about tortious interference. What is there in the record to indicate that Perkinelmer interferes with your relationship with -- I think the only thing I have seen in the papers is a footnote. I see one statement that goes to this. I am at a loss.
MR. MANN: There --
THE COURT: Tell me what there is. That makes it easy to answer the question.
MR. MANN: PE says Li-Cor's testimony in the deposition was that PE had nothing to do with our determination to terminate the contract with with Enzo.
THE COURT: Right.
MR. MANN: You'll recall that the potential interference has to do with PE giving away of the legal contract for the purpose of being able to sell.
THE COURT: Right.
MR. MANN: In the raft of letters that Li-Cor and Enzo exchanged in the process of terminating their relationship, there is a single reference to the fact prior to the termination, that Enzo is selling product to them which is too expensive and that PE has a cheaper product that works just as well.
That is the only reference in the documentary record

that I have been able to find that deals with that issue, but as to the question of what Li-Cor said in the deposition, what else were they going to say? They're certainly not going to say that we canceled the agreement so that we could get into a relationship with PE in order to injure Enzo. They're not going to say that.
THE COURT: You have you have to point in evidence. You can't say we had a contractual relationship with a third party. We no longer do. They now have a relationship with the defendant. Therefore, the defendant must have interfered. You have to have something else.
MR. MANN: There is a bit more on that subject. Enzo was related at the time Li-Cor was trying to terminate the contract, that Li-Cor was already in breach of the contract, they couldn't terminate it on that basis. They didn't have about cause termination. There is a bunch of correspondence about that in the record.
The result of that in the back-and-forth was Enzo saying to lee company already, if you give me the reports that you are supposed to give me and cures those breaches and you pay what it is you are supposed to pay, we'll forget about the fact you're in breach.
PE makes the argument in summary judgment that we didn't sue Li-Cor. We didn't sue Li-Cor because it was commercially not in Enzo's best interest.

THE COURT: They're not required to sue.
MR. MANN: Correct. That is not a good argument on their part.
THE COURT: That doesn't put any more meat on the bones, what we are talking about.
MR. MANN: All that there is on the Li-Cor issue is a body of circumstantial evidence buttressed by slight pieces of documentary evidence that remarkably Li-Cor terminates immediately and goes into arrangement with Perkinelmer for products which Enzo made payments, Perkinelmer had no right to make and sell under the distribution because they were not added as Exhibit C products.
THE COURT: All right. Any other points you want to cover?
MR. MANN: Yes, your Honor.
With respect to the fraudulent inducement, the economic loss argument, that is that the alleged fraud arises from the same contract issues that we are suing on, and that what Enzo is urging is that PE didn't intend to fulfill its obligations under the distribution agreement. It is just not true.
What Enzo is arguing here is that when PE entered into the settlement agreement -- and this is pleaded in the complaint, your Honor -- when PE entered into the settlement agreement, it entered into it knowing that the representations

it was making with respect to the strength of Enzo's patents, the prior infringement of Enzo's patents, the domination of Enzo's patents over the Dupont patents was not true.
The PE president who signed that agreement in his deposition said he didn't believe it was true. On the basis of his having said that, and those representations having been made, it is quite apparent what happened here was that in order for PE to be able to get access to the Enzo IP, and to be able to go forward and make these sales, it caused Enzo to enter into the distribution agreement.
While it may have intended to perform that distribution agreement appropriately at the time it entered into it, they didn't. They got us to enter into the distribution agreement by making a series of false representations in a second collateral agreement which has nothing to do -- which isn't a distribution agreement.
THE COURT: Which is the second collateral agreement?
MR. MANN: The settlement agreement.
THE COURT: The settlement, right.
MR. MANN: The fraudulent inducement occurs in getting those on the basis of the representations made in the settlement agreement. To enter into the distribution agreement which they promptly violated, that is the substance of the fraudulent inducement, not as PE describes, it but as Enzo describes it.

With respect to the restraint of trade, I am a little chagrined by the briefing by both parties here. We didn't do a very good job of it, I am afraid. The Supreme Court of the United States, in a case much later than anything cited by PE, has determined that in a vertical relationship such as we have here, buyer and seller, in the absence of monopoly power restrictions such as the ones we are talking about in this agreement that are non-pricing restrictions, but have to do with end use, and end users are perfectly permissible, and this is not a case of restraint of trade, not a case of patent misuse.

If your Honor bears with me just a second?

In Illinois Tool Works against Independent, Inc, 547 U.S. 28, a 2006 case, and Continental TV, Inc. versus GTE Sylvania, 433 U.S. 36, a 1977 case, you will find that the court has held that the existence of a patent which is either invalid or non-infringed has nothing to do with the question whether or not the restrictions imposed in a commercial arrangement are valid and enforceable.

I think, your Honor, that those cases will change the landscape with respect to these arguments about restraint of trade. I don't think either of us did a very good job for you in briefing them.

THE COURT: All right. I wasn't too sold on restraint of trade. That wasn't clear. In any event, I think that is

your time, Mr. Mann. Is there anything else you want to say in 30 seconds?

MR. MANN: Are there any other questions?

THE COURT: No, I don't think I do.

MR. MANN: Thank you.

THE COURT: Thank you. Mr. McElwain.

MR. McELWAIN: I will go in reverse order.

On the fraud in the inducement claim, I commend you to compare Paragraph 96 of the complaint, which is how they characterized misrepresentation they're relying on today. The two are really quite different and it has to be fundamental to a fraud claim they have to identify misrepresentation. As to the misrepresentation they identified today, it is that we said something about, we had an admission of infringement they were liable. I believe that is the essence of it.

Those admissions and stipulations were referenced in the distributorship agreement which expressly provides they become null and void when the agreement expires. There are two things going on there:

One, they can't rely on them as any basis of the claim because they become null and void;

Two, because they become null and void, that indicates as clearly as you possibly can that no one was relying on the stipulations of infringement. They were meant to give Enzo a litigation advantage, should there ever be litigation under the

agreements. I don't think the new claim is in the case at all. It is manifestly flawed.

I don't want to belabor that because you probably got it. Not only did they not sue for breach of contract, they don't demonstrate breach of contract. We are in a tortious interference world if we are anywhere and there is no demonstration of wrongful means. They don't demonstrate causation. That is the point of the deposition testimony.

Lastly, if I could just take one final run at the commercial research point? I was thinking, imagine the research tool is a microscope. Obviously, microscopes are used for drug-dealing and microscopes are used in institutions. If you sell that microscope to Pfizer, even if it is used in drug discovery, no one would say that is commercial exploitation of a microscope, or I sure wouldn't say that.

THE COURT: I can't imagine restriction on commercial exploitation on a microscope. I am not sure that is --

MR. McELWAIN: The analogy would be say you take that microscope and you resell it. That is commercial exploitation. Say you take that microscope and slap it on a tube and turn it into a telescope? That might be commercial.

In the case of nucleotides, there is one commercial use which the agreement clearly references which is a diagnostic. If you take a nucleotide and put it on a piece of DNA, it will allow you to detect DNA. That is a commercial

use. That is clearly excluded by the agreement.

THE COURT: No question it is completely excluded. The issue is what else is excluded?

MR. McELWAIN: I won't repeat myself. The jig is up once there is an agreement we can sell to commercial entities because there is no proof any of those commercial entities misused the product.

THE COURT: The part of the transcript that I have now read a couple of times talks about drug discovery, new drug discovery.

MR. McELWAIN: I think this is an issue of contract interpretation, and maybe the court will find it is ambiguous.

THE COURT: I understand it is --

MR. McELWAIN: I understand.

THE COURT: You are going to trial, right?

MR. McELWAIN: I understand. My point is I do think there is a contractual interpretation point to be made here, and that research, whether it is for commercial or other purposes, is permitted. There is no limit on the type of research you can do. It says you can do research. You can do it for fancy, for academics or commercial. There is no limit on the type of research.

THE COURT: It doesn't say that, right? You're saying you think that is consistent with what the words are. They don't say you can do it for any --

MR. McELWAIN: I guess I can't imagine why anyone would say that Pfizer scientists sitting at the bench and trying to discovery new drugs is not engaged in research. That would be a shock to Pfizer scientists, I feel confident.

What the contract is meant to do is to exclude the product being used, and a reselling of the product, taking the product and making it into different product, that is what commercial exploitation and commercial development is.

THE COURT: I wish I knew, but I am not sure it is so obvious. All right. Okay. Anything else?

Any other points?

MR. McELWAIN: No.

THE COURT: I am going to do research.

I think, candidly, this will be a split decision, and a split decision means we are going to be going to trial. I will give you as much notice of that as possible. I am making the trial November 4th. This is a slot-out date for trial. That is the first one I have slotted. I think this would be the one that will fill that slot.

MR. MANN: May I be heard?

THE COURT: Sure.

MR. MANN: You will recall, you recall --

THE COURT: Don't assume I recall anything. That is why there is a transcript.

MR. MANN: There has not been damages discovery in

this case. There has not been expert discovery in this case or in any of the cases for that matter. Damages discovery in these cases -- this one, too, has been -- is very interesting because during the 10 years of prior discovery here, whenever questions were asked that could arguably by defendants be said to be damages-related, discovery was not provided.

All that has ever been provided from PE that I am aware of is a list, schedule of list which had been somewhat updated who they sold it to and how much they sold. There is a lot of damages discovery that is yet to be done in this case. Frankly, your Honor, I don't see it getting done with expert discovery and pretrial orders and jury instructions and all of the rest by November 4th. I think that is an enormous undertaking.

THE COURT: Do you agree?

MR. McELWAIN: Your Honor, obviously I don't know what a split decision is. If we are going to try the split decision, we are ready to go on November 4th. If it is something else, I don't know. Mr. Mann is correct, there has been no damages discovery.

THE COURT: What does the expert discovery mean in this case?

MR. MANN: We will have an expert on the question of research-use only and pricing.

THE COURT: What expert?

MR. MANN: We will have an expert who has been on all sides of this industry, who will testify what those words mean in the industry.

THE COURT: That shouldn't take too much time.

MR. MANN: No. We will have an expert on damages who will talk about the pricing model, who will talk about the calculations. Those people have to be identified, they have to write their reports, there may be Daubert hearings. There needs to be rebuttal.

I think, your Honor, I am the plaintiff, so we want to go to trial, but in fairness and reasonably, I don't think we can accomplish this and all of the other things preliminary to trial by November 4th. It us just a month away, your Honor.

THE COURT: All right. I can set several trial dates because --

MR. MANN: You did ask us to research another two-week period, January 15th. That certainly would be more rational from our perspective.

THE COURT: Do you want to see --

MR. MANN: You mentioned this last January, and we appreciate that. We have all been in the situation of losing valued --I Think he is entitled to at least a gold watch.

THE COURT: I hear what you're saying. I will perhaps have to revisit the timing. I will give you more guidance with a written decision.

MR. McELWAIN: On damages, it was our understanding, and I am perfectly happy to revisit this, Judge Sprizzo bifurcated damages. If the suggestion is we are un-bifurcating damages, that needs to be understood. Damages was never in the case after Judge Sprizzo.

THE COURT: You think we can have a trial and another trial on damages?

MR. McELWAIN: My view, subject without having spoken to the client, is that bifurcation doesn't really make sense any more and I think if there was clarity in damages, there might be other benefits of that. It is a fact that damages is just not --

THE COURT: Why don't you guys do this: You think and chat amongst yourselves. I will issue a ruling that gives greater guidance, and then probably at the end of that ruling I'll ask you to submit a joint letter with your proposals as to next steps, and then maybe you'll agree or disagree. We'll have some combination of those two things.

MR. MANN: Great idea.

THE COURT: With that then, why don't we adjourn. I thank the Court Reporter for his time, and I need a copy of the transcript.

(Court adjourned)

FOR DISCUSSION PURPOSES ONLY

Proposed Schedule for Expert and Damages Discovery and Pretrial

a. Enzo shall serve a description of its theory of damages by [___]. The description need not include numbers but will be in sufficient detail to allow PerkinElmer to determine what discovery, if any, it needs to respond to Enzo's damages case.

b. PerkinElmer shall serve its rebuttal statement to Enzo's description by XXX in the same level of detail.

c. The parties will meet and confer by XXX to discuss the content of additional discovery, if any, related to damages.

d. Any disputes about the additional discovery shall be presented to the Court by XXX.

e. Any additional documents or interrogatory responses will be provided by the parties by XXX.

f. Party depositions related to damages shall be completed by [___].

g. Third-party discovery relating to damages shall be completed by [___].

h. All expert disclosures on all issues, including reports, production of underlying documents, and depositions shall be completed pursuant to the following deadlines:

   i. Each party shall identify the expert(s) they anticipate proffering at trial, along with a general description of the expert(s)' testimony, no later than [___].

   ii. Opening expert reports on issue(s) for which a party bears the burden of proof shall be served no later than [___].

   iii. Rebuttal expert reports shall be served no later than [___].

   iv. Expert depositions shall be completed no later than [___].

   v. Any motions to exclude expert testimony shall be filed no later than [___] days after that expert's deposition. Oppositions shall be due [___] days after filing of the motion to exclude, and replies due [___] days after filing of the opposition. If any of these days falls on a holiday or weekend, the papers shall be filed the next business day.

i. All expert and other damages-related discovery shall be completed no later than [___].

j. The joint pre-trial order shall be completed and submitted pursuant to the following deadlines:

i. The parties shall exchange proposed pre-trial orders and the items specified in Judge Sullivan's Individual Practices, Section 3(B) (exhibit lists, jury instructions, deposition designations, etc.) by [___]. Initial objections, responses, counter-designations, etc. shall be served by [___], and the parties are to confer thereafter.

ii. The parties shall submit a joint pre-trial order on [___].

k. Any motions in limine shall be served and filed by [___], with oppositions due on [___], and replies due on [___].

l. The Court will conduct a pre-trial conference on [___].

m. Counsel must meet for at least one hour to discuss settlement not later than [___].

n. The parties have conferred and their present best estimate of the length of trial is __ days.